

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DONALD E. NICHOLS**

Claimant

VS.

**APAC KANSAS, INC./SHEARS DIVISION**

Respondent

AND

**LIBERTY INSURANCE CORP.**

Insurance Carrier

Docket No. 1,063,684

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the April 26, 2013, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. James B. Zongker of Wichita, Kansas, appeared for claimant. John M. Graham of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found travel an intrinsic part of claimant's job duties, and therefore found claimant's August 13, 2012, motor vehicle accident an exception to the "going and coming" rule of the Kansas Workers Compensation Act (Act). The ALJ awarded claimant temporary total disability benefits, reimbursement of his expenses upon proper presentation, and payment by respondent of the medical expenses incurred from the date of the motor vehicle accident, as authorized. Dr. Archie Heddings was designated as the authorized treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 25, 2013, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

The respondent argues the ALJ exceeded his jurisdiction in granting medical treatment and temporary total disability benefits to claimant. Further, respondent contends

claimant's motor vehicle accident is not compensable under the Act as claimant was traveling from his work site to home outside the course of his employment.

Claimant requests the ALJ's Order be affirmed. Claimant maintains travel was an inherent part of his employment; therefore, the "going and coming" rule does not exclude coverage by the Act.

The sole issue for the Board's review is: Did claimant's accidental injuries arise out of and in the course of his employment with respondent?

#### **FINDINGS OF FACT**

Claimant began employment with respondent on August 11, 2011, as a paver on a road construction crew. This position required claimant to work in various locations. Claimant testified he would show up for work each day at the location of the equipment. He further stated he would drive his own vehicle to and from the mobile work site<sup>1</sup>, as it was his understanding that the position required a means of transportation. Claimant testified respondent did not provide transportation for its road construction employees.

Claimant had been assigned to a site in Sylvia, Kansas, for construction work lasting approximately four months. He and a co-worker, Jesse Stroup, shared a motel room nearby for the duration of the assignment because they each lived a long distance from the site. The motel room was neither mandated nor paid for by respondent. On Sunday, August 12, 2012, claimant decided to leave the motel and return to his home, as he knew the following day would be the last onsite in Sylvia. Claimant allowed Mr. Stroup to spend the night at his home in Newton, Kansas, and together the next morning they traveled the approximately 60 minutes to the work site in Sylvia. Claimant testified he would occasionally voluntarily car pool with co-workers to save money. He further stated respondent did not provide payment for mileage or travel, nor did respondent care how its employees arrived at a job site. Claimant was not Mr. Stroup's supervisor.

On August 13, 2012, claimant and Mr. Stroup left the work site in Sylvia, Kansas, at approximately 8:00 p.m., after their work shift ended. Because they were to report to a new work site near Hedville, Kansas, the next morning, both claimant and Mr. Stroup traveled together to claimant's residence to obtain Mr. Stroup's truck before beginning the journey to the new site. Before reaching claimant's home and when crossing the intersection of West 1<sup>st</sup> Street and Ridge Road in Newton, Kansas, claimant was hit by a drunk driver who failed to stop at a stop sign. Claimant was transported by ambulance to

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<sup>1</sup> Claimant was not driving his own vehicle on the date of the accident but rather the vehicle of his roommate, Rita Eason. Claimant testified he had permission to use Ms. Eason's vehicle, and he regularly performed maintenance on the vehicle.

Emergency Care following the accident with injuries to his pelvis, right hip, head, right leg, right groin, and right arm. Claimant's co-worker did not survive his injuries.

Claimant received treatment from various providers for his multiple injuries. He stated he was transferred to two different hospitals before finally arriving at KU Medical Center in Kansas City, Kansas. On August 24, 2012, claimant underwent surgery with Dr. Archie Heddings, a board certified orthopedic surgeon, for an open reduction and internal fixation of an anterior pelvic ring. A plate was attached to claimant's pelvis and his right acetabular fracture treated. Dr. Heddings indicated claimant was to be nonweightbearing for approximately 10 weeks following his surgery. Claimant was taken off work. He was admitted to Trinity Nursing & Rehab until December 7, 2012, when he was released to return home. He continued to treat with local providers between appointments with Dr. Heddings.

Claimant received Family and Medical Leave from respondent beginning August 14, 2012, until November 6, 2012. On November 26, 2012, claimant was placed on seasonal layoff with respondent. Claimant received reimbursements from PIP benefits during that time, and his medical insurance provider paid for his medical treatment. He did not report his accident as a workers compensation claim until December 21, 2012.

On March 28, 2013, Dr. Heddings released claimant to work with restrictions. Respondent did not offer claimant accommodated work at that time. As a result of not being accommodated, claimant filed for unemployment benefits. He has not worked since the accident.

#### **PRINCIPLES OF LAW**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>2</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."<sup>3</sup>

K.S.A. 2012 Supp. 44-508(f)(3)(B) states:

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's

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<sup>2</sup> K.S.A. 2012 Supp. 44-501b(c).

<sup>3</sup> K.S.A. 2012 Supp. 44-508(h).

negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>5</sup>

### ANALYSIS

Generally, if an employee is injured while on his or her way to assume the duties of employment or after leaving such employment, the injuries are not considered to have arisen out of and in the course of employment under K.S.A. 2012 Supp. 44-508(f). This rule is known as the “going and coming” rule.<sup>6</sup> The rationale for the “going and coming” rule was explained in *Thompson*:<sup>7</sup> “[W]hile on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment. [Citations omitted.]” “[T]he question of whether the “going and coming” rule applies must be addressed on a case-by-case basis.” [Citation omitted.]”<sup>8</sup>

K.S.A. 2012 Supp. 44-508(f) is a codification of the “going and coming” rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's

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<sup>4</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>5</sup> K.S.A. 2012 Supp. 44-555c(k).

<sup>6</sup> See *Chapman v. Beech Aircraft Corp.*, 20 Kan. App. 2d 962, 894 P.2d 901, aff'd 258 Kan. 653, 907 P.2d 828 (1995).

<sup>7</sup> *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

<sup>8</sup> *Chapman v. Beech Aircraft Corp.*, 20 Kan. App. 2d at 964; see *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, Syl. ¶ 3.

employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.<sup>9</sup>

In addition to the specific language contained in K.S.A. 2012 Supp. 44-508(f), Kansas courts have long recognized an exception to the "going and coming" rule where travel is an intrinsic part of the employee's job.<sup>10</sup> Our Supreme Court noted that when travel becomes an intrinsic part of the job it is an element of employment.<sup>11</sup> The Court of Appeals explains the inherent travel exception in *Williams v. Petromark Drilling, LLC*.<sup>12</sup>

While caselaw deems inherent travel an exception to the going-and-coming rule, "it appears the analysis is really whether travel has become a required part of the job such that the employee actually assumes the duties of employment from the moment he or she leaves the house and continues to fulfill the duties of employment until he or she arrives home at the end of the workday." *Craig*,<sup>13</sup> 47 Kan. App. 2d 164, 168-69, 274 P.3d 650 (rejecting argument that judicially created inherent-travel exception to K.S.A. 44-508(f) not viable after *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009), because it contradicts clear statutory language); *Quintana*,<sup>14</sup> 2012 WL 1759430, at \*6-7 (same; noting Kansas Supreme Court has not departed from any cases recognizing inherent-travel exception since *Bergstrom*).

In this case, claimant could not have accepted or maintained employment with respondent without the ability to travel to the work site. Claimant was paid \$40.00 per day for the expenses associated with working in remote locations. Travel was an intrinsic part of claimant's job and, as such, an element of employment.

### **CONCLUSION**

Claimant has proved by a preponderance of the evidence that he suffered an accidental injury arising out of and in the course of his employment with respondent.

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<sup>9</sup> *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, Syl. ¶ 1, 416 P.2d 754 (1966).

<sup>10</sup> *Scott v. Hughes*, 294 Kan. 403, 414, 275 P.3d 890, citing, *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 289, 144 P.3d 668 (2006); *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 277, 899 P.2d 1058 (1995).

<sup>11</sup> *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 289, 144 P.3d 668 (2006).

<sup>12</sup> *Williams v. Petromark Drilling, LLC*, No. 108,125, 2013 WL 2450535 (Kansas Court of Appeals opinion filed June 7, 2013), petition for review filed July 8, 2013.

<sup>13</sup> *Craig v. Val Energy, Inc.*, 47 Kan.App.2d 164, 166, 274 P.3d 650 (2012), *rev. denied* 297 Kan. \_\_\_\_ (May 20, 2013).

<sup>14</sup> *Quintana v. H.D. Drilling, LLC*, Nos. 106,126, 106,127, 106,131, 2012 WL 1759430 (Kansas Court of Appeals unpublished opinion filed May 11, 2012).

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated April 26, 2013, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2013.

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

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Thomas Klein, Administrative Law Judge